

**UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

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| <b>THOMAS BAILEY,</b>              | : | <b>CIV NO. 1:19-CV-1281</b>       |
|                                    | : |                                   |
| <b>Plaintiff,</b>                  | : |                                   |
|                                    | : |                                   |
| <b>v.</b>                          | : | <b>(Magistrate Judge Carlson)</b> |
|                                    | : |                                   |
| <b>JESSE KIRSCH, M.D., et al.,</b> | : |                                   |
|                                    | : |                                   |
| <b>Defendants.</b>                 | : |                                   |

**MEMORANDUM AND ORDER**

**I. Statement of Facts and of the Case**

This case is a *pro se* prisoner civil rights action brought by Thomas Bailey, an inmate at the Berks County Prison. In his complaint Bailey alleges that prison officials are forcing him to take phenobarbital against his will. (Doc. 1.) Bailey's complaint names a doctor at the prison and the prison warden as defendants and alleges that the events set forth in his pleading have taken place at the Berks County Prison. Thus, all parties are found in Berks County, and this case arises out of matters that allegedly took place in Berks County.

Berks County is located within the jurisdiction and venue of the United States District Court for the Eastern District of Pennsylvania. See 28 U.S.C. § 118(a). Given these facts alleged by Bailey in this complaint, which involve parties and incidents that fall exclusively within Berks County, we conclude that the United

States District Court for the Eastern District of Pennsylvania is the most appropriate venue for litigation of this matter, and we will order this case transferred to that court for further proceedings.

## **II. Discussion**

This case is a federal civil action. In such cases, 28 U.S.C. § 1391(b) defines the proper venue and provides that an action should:

[B]e brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(b).

In this case, “a substantial part of the events or omissions giving rise to the claim occurred” in Berks County and it appears that the defendants may be found in Berks County, which is within the venue of the United States District Court for the Eastern District of Pennsylvania. Therefore, this case appears to fall within the venue of the United States District Court for the Eastern District of Pennsylvania.

This court is permitted *sua sponte* to raise the issue of an apparent lack of venue, provided the court gives the plaintiff notice of its concerns and an opportunity to be heard on the issue. See e.g., Stjernholm v. Peterson, 83 F.3d 347, 349 (10th

Cir. 1996)(“[A] district court may raise on its own motion an issue of defective venue or lack of personal jurisdiction; but the court may not dismiss without first giving the parties an opportunity to present their views on the issue”); Costlow v. Weeks, 790 F.2d 1486, 1488 (9th Cir. 1986). In this case, through the filing of Memorandum, we are placing the plaintiff on notice that this complaint does not allege facts that would give rise to venue over this action in this court.

When it appears that a case has been brought in the wrong venue, there are two potential remedies available to the court. First, the court may dismiss the action for lack of venue pursuant to 28 U.S.C. § 1406 and Rule 12(b)(3) of the Federal Rules of Civil Procedure. However, the court may also, in the interests of justice, provide another form of relief, one which ensures that venue is proper without prejudicing the rights of any plaintiffs. Under 28 U.S.C. § 1406:

The district court of a district in which is filed a case laying venue in the wrong . . . district shall dismiss, *or if it be in the interest of justice, transfer such case to any district . . . in which it could have been brought.*

28 U.S.C. § 1406(a)(emphasis added).<sup>1</sup>

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<sup>1</sup> In addition, we note that, even if venue was somehow appropriate here, it is clear that the preferred venue for litigation of this particular case, which involves a defendants and claims arising in Berks County would be the United States District Court for the Eastern District of Pennsylvania. In such instances, 28 U.S.C. § 1404(a) also expressly provides that: “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to

In this case, since venue over this matter appears to lie in the United States District Court for the Eastern District of Pennsylvania, in order to protect the plaintiff's rights as a *pro se* litigant, we will order this case transferred to the United States District Court for the Eastern District of Pennsylvania for further proceedings. Such a transfer order avoids any prejudice to the plaintiff which might flow from a dismissal of this action on venue grounds. See Burnett v. New York Cent. R. Co., 380 U.S. 424, 430 (1965). Moreover, addressing the lack of venue in this fashion would not constitute a ruling on the merits of the plaintiff's claims, thus assuring that the plaintiff can have this case heard on its merits in the proper forum. See, 18 Wright, Miller & Cooper Federal Practice and Procedure, § 4436, at 338 (stating that “a dismissal for lack of jurisdiction or improper venue does not operate as an adjudication upon the merits”) (footnote omitted).

Finally, we note that:

A motion to transfer venue ... involves a non-dispositive pretrial matter which a magistrate judge may determine pursuant to 28 U.S.C. § 636(b)(1)(A). See Silong v. U.S., 5:05–CV–55–OC–10GRJ, 2006 WL 948048, at \*1 n. 1 (M.D.Fla. April 12, 2006); Blinzler v. Marriott Int'l, Inc., No. Civ. A. 93–0673L, 1994 WL 363920, at \*2 (D.R.I. July 6, 1994); O'Brien v. Goldstar Tech., Inc., 812 F.Supp. 383 (W.D.N.Y.1993); Russell v. Coughlin, No. 90 Civ. 7421, 1992 WL 209289 (S.D.N.Y. Aug.19, 1992); Hitachi Cable Am., Inc. v. Wines, Civ.A. No. 85–4265, 1986 WL 2135 (D.N.J. Feb.14, 1986). This is true

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any other district or division where it might have been brought . . . .” 28 U.S.C. § 1404 (a).

“because it can only result in the transfer of a case to another federal district, not in a decision on the merits or even a determination of federal jurisdiction.” Adams v. Key Tronic Corp., No. 94 Civ. AO535, 1997 WL 1864, at \*1 (S.D.N.Y. Jan. 2, 1997) (collecting cases).

Berg v. Aetna Freight Lines, CIV.A. 07–1393, 2008 WL 2779294 (W.D. Pa. July 15, 2008). See, e.g., Brett v. Gertz, 3:12–CV–1429, 2012 WL 4839006 (M.D. Pa. Sept. 12, 2012) report and recommendation adopted, 3:CV–12–1429, 2012 WL 4838997 (M.D. Pa. Oct. 10, 2012) (citing Market Transition Facility of New Jersey v. Twena, 941 F.Supp. 462 (D.N.J. 1996)); Holley v. Robinson, CIV. 1:10–CV–585, 2010 WL 1837797 (M.D. Pa. Apr. 2, 2010) report and recommendation adopted, 1:10–CV–585, 2010 WL 1837793 (M.D. Pa. May 6, 2010) (same); McManus v. Giroux, No. 3:13-CV-1729, 2013 WL 3346848, at \*2–3 (M.D. Pa. July 2, 2013).

Therefore, the decision to transfer a case rests within the jurisdiction and sound discretion of a United States Magistrate Judge under 28 U.S.C. § 636(b)(1)(A), subject to appeal to the district court for an abuse of that discretion. See Franklin v. GMAC, CIV.A. 13–0046, 2013 WL 140042 (W.D. Pa. Jan. 10, 2013) (“Orders to transfer are not listed as dispositive..... A Magistrate Judge may rule on such matters pursuant to 28 U.S.C. § 636(b)(1)(A). See, e.g., Silong v. United States, 2006 WL 948048, at \*1 n. 1 (M.D. Fla. 2006). See also In re U.S. Healthcare, 159 F.3d 142, 145 (3d Cir. 1998) (a dispositive order is one that “terminates the matter in the federal court”). This is true “because [the ruling] can only result in the

transfer of a case to another federal district, not in a decision on the merits or even a determination of federal jurisdiction.” Adams v. Key Tronic Corp., 1997 WL 1864, at \*1 (S.D.N.Y. 1997) (collecting cases); see also Holley v. Robinson, 2010 WL 1837797, \*2 (M.D. Pa. 2010) (since “order transferring a case is not a dispositive final order in that case, this proposed transfer is a matter which lies within the authority of either the district court, or this [magistrate] court.”); Berg v. Aetna Freight Lines, 2008 WL 2779294, at \*1 (W.D. Pa. 2008) (“A motion to transfer venue pursuant to 28 U.S.C. § 1404(a) involves a non-dispositive pretrial matter which a magistrate judge may determine pursuant to 28 U.S.C. § 636(b)(1)(A)”) (collecting cases)).

### **III. Conclusion**

For the foregoing reasons, we will order that this case be transferred to the United States District Court for the Eastern District of Pennsylvania for further all proceedings.

An appropriate order follows.

S/ Martin C. Carlson  
Martin C. Carlson  
United States Magistrate Judge

DATE: July 24, 2019